STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 10, 2005
v	No. 250156 Wayne Circuit Court
TERRENCE MARTIN HENDERSON, Defendant-Appellant.	LC No. 03-002508-01

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of carjacking, MCL 750.529a, and armed robbery, MCL 750.529. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to seventeen to fifty years in prison, for both the carjacking and armed robbery convictions. We affirm.

I. FACTS

The charges arose from an incident occurring at a gas station in the city of Detroit on February 6, 2003. The victim entered the parking lot of the gas station, driving a red 2002 Chevy Cavalier, to use a pay phone from her car. As the victim completed her phone call, defendant approached her car and placed a knife at her throat, demanding her car keys. After a struggle by the victim to keep her keys, she exited the car through the passenger side and defendant drove off. The victim then called 911 and gave a description of her car and the incident. The victim testified that the knife had a serrated edge, and that it was held to the left side her neck. Furthermore she testified that defendant was wearing a black jacket, dark pants, a black skull cap and that defendant's face was approximately one foot from her face during the attack, with nothing obscuring defendant's face. The following day, on February 7, 2003, defendant was stopped for speeding on the campus of Michigan State University (MSU), driving a red 2002 Chevy Cavalier. The officer ran the vehicle through the LEIN system and discovered the car to be stolen. Defendant was subsequently arrested and transported to the station. An inventory search of the car revealed a steak knife approximately 10 inches long with a black handle and a 4.5 inch blade. Defendant was subsequently transported back to Detroit where the victim gave a positive identification in a picture line-up, identifying defendant as her attacker. Defendant was subsequently convicted of carjacking and armed robbery.

II. DOUBLE JEOPARDY

A. Standard of Review

In order to preserve a double jeopardy issue, the defendant must raise it at trial. *People v. Wilson*, 242 Mich App 350, 359-360; 619 NW2d 413 (2000). Defendant did not raise the double jeopardy issue at trial, thus he has failed to properly preserve this issue. This court reviews an unpreserved constitutional issue for plain error affecting a defendant's substantial rights. *Wilson, supra* at 359-360.

B. Analysis

First, defendant contends that his convictions for armed robbery and carjacking violate the constitutional prohibitions against double jeopardy. We disagree.

The same argument raised by defendant has already been thoroughly considered and rejected by this Court. See *People v Parker*, 230 Mich App 337, 341-345; 584 NW2d 336 (1998); see also, *People v Davis*, 468 Mich 77, 80-82; 658 NW2d 800 (2003). In *Parker, supra* at 343-345, this Court held that:

> "Although both crimes involve property loss to a person, either a motor vehicle or other property, the Legislature designed each statute to prevent a different type of harm. See *People v Guiles*, 199 Mich App 54, 58; 500 NW2d 757 (1993). It is clear from the language of the carjacking statute that the Legislature intended to prohibit takings accomplished with force or the mere threat of force. In contrast, it is clear from the language of the armed robbery statute that the Legislature intended to prohibit takings accomplished by an assault and the wielding of a dangerous weapon. A further source of legislative intent is the amount of punishment expressly authorized by the Legislature. . . . In the carjacking statute, the Legislature specifically authorized two separate convictions arising out of the same transaction. MCL 750.529a(2); MSA 28.797(a)(2). Although the Double Jeopardy Clauses restrict courts from imposing more punishment than that intended by the Legislature, the Legislature may authorize cumulative punishment of the same conduct under two different statutes. . . . From the subject and language of these statutes, we can conclude that that Legislature intended multiple punishments for violations of different social norms.
>
> Defendant's carjacking and armed robbery convictions also do not violate the Double Jeopardy Clause of the federal constitution because they do not constitute the "same offense" under the same-elements test from *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). . . . Under the *Blockburger* test, our inquiry is whether the two separate statutes each include an element that the other does not. *Id.* at 707. Here, the offense of carjacking does not require proof that the defendant intended to deprive the victim permanently of possession of the vehicle. *People v Terry*, 224 Mich App 447, 454-455; 569 NW2d 641 (1997). Armed robbery, a specific intent crime, requires this showing. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). Also, the offense of armed robbery requires proof that the defendant was armed with a dangerous weapon. *Id.* The offense of carjacking has no such requirement.

> Therefore, under both federal and state analyses, it is clear that the Legislature intended to separately punish a defendant convicted of both carjacking and armed robbery, even if the defendant committed the offenses in the same criminal transaction." [*Parker, supra* at 343-345.]

We find no flaw in the underlying analysis of *Parker*, therefore we do not need to address Defendant's argument that *Parker* was wrongly decided. Moreover, defendant's attempt to distinguish *Parker* on its facts is unpersuasive. The record indicates that defendant took the car of the victim, Jessie Young, at knifepoint. Defendant grabbed her keys and Young crawled out of the car on the passenger side. Defendant then sped away in her car. Young had her cell phone and CDs in the car, which were never returned, although Young's car was eventually recovered. These circumstances support defendant's convictions for the separate and distinct offenses of armed robbery and carjacking. *Parker, supra* at 343-345. Accordingly, we hold that there was no error in convicting defendant for both armed robbery and carjacking.

III. EFFECTIVENESS OF COUNSEL

Next, defendant contends that trial counsel's failure to challenge the admission of the photographic showup constituted ineffective assistance of counsel. Specifically, defendant argues that trial counsel should have moved to suppress the photographic showup that was conducted while defendant was in custody. We disagree.

A. Standard of Review

Defendant did not move for a new trial or a *Ginther*[1] hearing, therefore Defendant has not fully preserved this issue for appeal and our review is limited to the mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). A trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court will not reverse a conviction based on ineffective assistance of counsel unless the defendant establishes that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002), and that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra* at 578; *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

B. Analysis

Generally, photographic showups are not permitted where the defendant is in custody and available for a live lineup. *People v Kurylczyk*, 443 Mich 289, 298 n 8; 505 NW2d 528 (1993). However, in *People v Anderson*, 389 Mich 155, 186-287 n 22; 205 NW2d 461 (1973), overruled

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

in part on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004), our Supreme Court stated that a photographic showup may be used in lieu of a live lineup where there are an insufficient number of persons available with the defendant's physical characteristics.

Here, Officer Mark Burke testified that he tried to compose a live lineup, but he could not locate five males of defendant's age, height, weight and race. Officer Burke called around to different precincts but could not find any black males in custody that fit defendant's description. Officer Burke also testified that most of the people in custody were notably younger than defendant.

Defendant argues that Officer Burke should have made more exhaustive efforts to locate suitable participants for a live lineup from a neighboring county or to set up a live lineup next day. However, the police are not required to make endless efforts to arrange a live lineup. *People v Davis*, 146 Mich App 537, 547; 381 NW2d 759 (1985). Officer Burke's inability to compose a fair live lineup was due to the difficulty of finding suitable participants, and not his lack of effort, thus rendering the photographic lineup permissible. *Anderson*, *supra* at 186-187 n 22. In addition, nothing in the record shows that photographic showup was impermissibly suggestive. An attorney was present and made no objection to the photographic showup procedure. The photo array was prepared with six photographs that were similar to defendant's physical characteristics. Defendant failed to demonstrate that the photographic showup procedure was improper, and thus, a motion to challenge the admission of the photographic showup would have been unsuccessful.

Further, contrary to defendant's argument, Young had an independent basis for identifying defendant in court. Factors used to determine whether a witness has an independent basis for an in-court identification include:

> "The opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." [*Kurylczyk, supra* at 306, 318.]

Young testified that she viewed defendant's face from approximately one foot away and there was nothing blocking her view. Although it was nighttime, there were lights illuminating the gas station where the incident occurred. Young's description of defendant exactly fit defendant when he was apprehended. She was thoroughly cross-examined with regard to the conditions and circumstances under which she viewed defendant, and thus, any reason to question the accuracy of her identification was before the court. The evidence shows that Young immediately identified defendant at the photographic showup. Further, other evidence shows that defendant was caught only two hours after the incident, driving alone in Young's car. Thus, the facts adduced at trial demonstrate that an independent basis existed for the identification and a motion to challenge the in-court identification would have been unsuccessful.

Since Defendant has failed to establish that there is a reasonable probability that, but for the alleged error in defense counsel's failure to object to the admission of the photographic showup and Young's in-court identification, the result of the proceedings would have been different, his claim of ineffective assistance of counsel also fails. *Bell, supra* at 695. Trial

counsel will not be deemed ineffective for failing to advocate a meritless position or failing to bring a fruitless motion. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000); *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

IV. JURY INSTRUCTIONS

Next, defendant argues that he was denied a fair trial when the trial court gave the jury a flight instruction over defendant's objection. Specifically, defendant argues that defendant's mere departure of the scene of the crime does not constitute the true meaning of flight as established by law. We disagree.

A. Standard of Review

This Court reviews this claim of instructional error de novo, and examines the instructions in their entirety to determine whether the evidence supports the instructions given, and to ensure that the instructions do not exclude material issues, defenses and theories supported by the evidence. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). The term "flight" has been defined to include such actions as fleeing the scene of the crime, leaving the jurisdiction, running from he police, resisting arrest, and attempting to escape custody. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

B. Analysis

We hold that there is sufficient evidence to support the giving of the flight instruction**,** leaving it to the jury to determine if defendant did run away and whether his flight was indicative of guilt. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). The evidence established that defendant left the scene of the crime before Young ran to the gas station to call 911. Within two or three hours of the crime, defendant drove from the scene of the crime in Detroit to another city, East Lansing, where he was stopped for speeding and subsequently apprehended. Under the circumstances of having just left the crime scene and driving the victim's car to another city, it cannot be said that defendant merely departed the scene without fear of apprehension. *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989). As such, the trial court did not err in giving the flight instruction.

Further, any error in instructing the jury on flight was harmless. The trial court instructed the jury that the evidence of flight did not prove guilt and that a person may run or hide for innocent reasons such as panic, mistake, or fear. These instructions were sufficient to protect defendant's rights, *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997), and there was no miscarriage of justice, *People v Bartlett*, 231 Mich App 139, 144; 585 NW2d 341 (1998). Thus, we find no error requiring reversal.

V. RIGHT TO TESTIFY

Next, defendant contends that his rights to testify and to present his defense were violated because nothing in the record indicates explicit waiver by defendant of his right to testify. We disagree.

A. Standard of Review

Defendant did not preserve this constitutional issue by raising it at trial, and thus, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

B. Analysis

Defendant failed to show any error because an on-the-record waiver is not required in Michigan and the trial court had no duty to advise defendant of the right to testify, nor was it required to determine whether defendant made a knowing and intelligent waiver of the right. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991). Accordingly, even if there was no waiver of defendant's right to testify on the record, the trial court made no error with regard to defendant's waiver of his right to testify.

VI. SENTENCING

Finally, defendant argues that, while his sentence is within the appropriate guidelines range, he is nonetheless entitled to have his sentence reviewed for an abuse of discretion, and that, upon review, this Court should find that defendant's sentence was disproportionate and represents an abuse of discretion. We disagree.

A. Standard of Review

Defendant raises a constitutional issue by arguing that MCL 769.34(10), which precludes review of sentences within the recommended minimum sentence range under the legislative guidelines, violates the separation of powers and due process. We review the constitutional issue de novo. *People v Garza*, 469 Mich 431, 433; 670 NW2d 662 (2003).

B. Analysis

Our Supreme Court has already stated, in *Garza, supra* at 435, that the provision's limitation on review does not violate the constitutional separation of powers. The Court reasoned that the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature. *Id.* at 434-435. Const 1963, art 4, § 45 provides the Legislature with that authority. *Id.*, citing *People v Hegwood*, 465 Mich 432, 436-437; 636 NW2d 127 (2001). The Court held that the Legislature's comprehensive sentencing reforms, including detailed guidelines for appellate review of sentences, were constitutional. *Id.*

Defendant also asserts that MCL 769.34(1) violates his constitutional right to an appeal as of right. Defendant, however, cites no authority to support his position. Where a defendant fails to explain or rationalize his position, or cite authority to support his position, the issue is abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

MCL 769.84(10) provides that "if a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." *Garza, supra* at 432-433. Here, defendant's

minimum sentence of seventeen years (204 months) is within the guidelines range of 81 to 270 months, and defendant does not claim that the trial court relied on inaccurate information in imposing sentence. As such, defendant's sentence must be affirmed.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Peter D. O'Connell